BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by John Leonis dated February 16, 1996, alleging discrimination in the occupancy of accommodation on the basis of family status.

B E T W E E N :

Ontario Human Rights Commission

- and -

John Leonis

Complainant

- and -

Metropolitan Toronto Condominium Corporations Nos. 741 (Trillium); 742 (Vista); and 634 (Skypark)

Respondent

DECISION

Adjudicator : Mary Anne McKellar

Date : June 30, 1998

Board File No: BI-0121-97; BI-0122-97; BI-0123-97

Decision No : 98-012

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Roger Palacio, Counsel
John Leonis, Complainant	)	John Leonis, on his own behalf
Metropolitan Toronto Condominium Corporations Nos. 741, 726 and 634, Respondents	)	Patricia Conway, Counsel

INTRODUCTION

Pursuant to s. 36(1) of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended ("the *Code*"), the Ontario Human Rights Commission ("the Commission") referred the complaints of John Leonis ("the Complainant") dated February 16, 1996 to the Board of Inquiry ("the Board") for a hearing. The Complaints allege that Metropolitan Toronto Condominium Corporations Nos. 741 (Trillium); 726 (Vista); and 634 (Skypark) infringed the Complainant's right to equal treatment with respect to occupancy of accommodation by discriminating against him on the basis of family status contrary to the *Code*.

I rejected a motion by the Complainant and the Commission to add the Complainant's daughter as a complainant on the basis that my jurisdiction to add parties extends to the addition of respondents only. See s. 39(3) of the *Code*.

Although the Complainant testified in these proceedings and was present during the testimony of other witnesses, he did not attend during argument. Commission counsel advised the Board that the Complainant consented to the matter being disposed of on the basis of the submissions made by the Commission and the Respondents.

THE ISSUES

There are four issues to be determined with respect to this complaint:

(1) Does the complaint relate to "occupancy of accommodation" or "provision of services"?

(2) If the complaint relates to "provision of services", have the Respondents made out a defence under s. 20(3) of the *Code*?

(3) Did the Complainant suffer direct discrimination on the basis of "family status"?

(4) Did the Respondents' rules respecting children's use of their recreational facilities have a differential impact on parents? Did the Respondents fail to offer appropriate accommodation to the needs

of parents, thereby constructively discriminating on the basis of "family status" ?

THE DECISION

I find that Respondents infringed the Complainant's right to be free from discrimination on the basis of family status with respect to the occupancy of accommodation, contrary to ss. 2(1) and 9 of the *Code*. My remedial orders are found at the conclusion of these reasons.

THE FACTS

These findings of fact are based on the Agreed Statement of Fact filed by the parties, and on the testimony of the following witnesses: John Leonis; Johanna Leonis; Margaret Weir; Ann Sullivan; Stephen Baksi; Monika Schlichting; and Connie Wu.

The Complainant is the registered owner of Unit #908 in Trillium. He purchased and has occupied this unit since 1989. Pursuant to s. 6(2) of the *Condominium Act*, R.S.O. 1990, c. C-26, he is entitled to exclusive use and ownership of Unit #908.

As a Trillium unit owner, the Complainant also has an undivided interest in the common elements owned by Trillium. See s. 7(2) of the *Condominium Act*.

In this case, the common elements include a recreational facility ("the Centre"), which is jointly owned and operated by Trillium and the two other respondents. All owners and occupants of units in Trillium, Vista and Skypark are entitled to use and are provided with a key that allows them to access the Centre. A member of the public cannot join the Centre or use its facilities except as the guest of an owner or occupant.

Pursuant to s. 25 of the *Condominium Act*, rules have been promulgated respecting the use of Trillium's common elements, including the Centre. These rules also apply to Vista and Skypark unit owners and occupants.

A recreation committee comprising two representatives of each of the Respondents' boards of directors is responsible for periodically reviewing the rules respecting the Centre and recommending any changes to them. Those recommendations, if approved by the boards, are put to the unit owners, and become effective upon approval by a majority of those unit owners.

The rules respecting the Centre, including those in place at the time of the Complainant's purchase of Unit #908, have always restricted the use of the Centre by persons under 16 years of age ("Children"). Children have been absolutely prohibited from using some amenities, such as the fitness room, while other amenities, notably the swimming pools, have been available for their use during restricted hours only. The following is a comparison, by amenity, of the restrictions applicable to Children contained in the rules in 1988, 1992, and 1997.

Restrictions Applicable To Children			
Amenity	1988 Rules	1992 Rules	1997 Rules
Party Room	None	None	None
Lounge	None	None	None
Fitness Room	No Children	No Children	No Children
Billiard Room	No Children	No Children	Children only if an adult is a player
Hobby & Table Tennis	Children under 13 if accompanied by an adult	No Children	No Children
Golf	N/A	N/A	No Children
Courts	None	No Children	Children only if an adult is a player
Whirlpool	No Children	No Children	No Children

Pools	Children 4-15 may use from 10:30 a.m. to 1:00 p.m. daily	Children 4-15 may use from 10:30 a.m. to 1:00 p.m. daily	Children 4-15 may use from 10:30 a.m. to 1:00 p.m. daily
General	None	Children 4-15 only if accompanied by adult No Children under 4 anywhere	Children 4-15 only if accompanied by adult No Children under 4 in pool areas

The Complainant has a daughter, Johanna Leonis. She has never lived with him in Trillium Unit #908, but she has been a frequent visitor. At the time of this hearing, Johanna Leonis was 16 years of age, but at all times relevant to the matters alleged in the complaint, she was under 16 years of age and her use of the Centre was consequently restricted by the rules.

The Complainant alleges that the restrictions applicable to Children's use of the Centre contravene the *Code* by infringing his right to equal treatment in the occupancy of accommodation on the basis of family status. The Complainant and his daughter testified that they would have liked to use the fitness room and the whirlpool, both of which were completely off limits to Children. Additionally, they would have liked to use the swimming pool at times other than those reserved for Children, that is, 10:30 a.m. to 1:00 p.m. daily.

The Complainant and his daughter never attempted to use the fitness room in violation of the rules.

They used the whirlpool for a short period of time in 1990, but only after the Complainant had written to the recreation committee and received a reply from committee member Lorne Soehner indicating that he did not see why their use of the whirlpool would pose

a problem. It was established in evidence that the rules respecting the use of the whirlpool had not changed and that neither Soehner nor the committee had any authority to over-ride them. A group of residents of Skypark, Vista and Trillium voluntarily undertook to patrol the Centre and ensure compliance with its rules. After one of them advised the Complainant that the rules applied notwithstanding the contents of Soehner's letter, the Complainant and his daughter ceased using the whirlpool.

The Complainant and his daughter also never attempted to use the swimming pools outside of Children's hours, although the Complainant's letter to the recreation committee in 1990 did propose changing the Children's hours for the indoor pool to an after-school period, while leaving the outdoor pool hours at 10:30-1:00 p.m. daily. Soehner's reply was that the committee itself could not change the rules, but he set out the applicable procedure under the *Condominium Act* for obtaining a rule change. In 1992, the Complainant circulated a petition seeking to have the Children's pool hours changed or extended to include an after-school period, and seeking to have use of the whirlpool made available to Children. The annual general meetings of the Respondents in May 1996 defeated a proposal to extend the Children's pool hours to 5:00-7:00 p.m. daily, and to extend the use of the whirlpool to Children over the age of 4. The Complainant himself never sought to change the Children's rules pursuant to the procedures set out in the *Condominium Act*, nor did he seek to challenge them through the mechanism set out in that legislation.

The Complainant testified before me that his daughter needed to use the swimming pool and other facilities because of a medical condition. This fact was never made known to the Respondents until well after this matter had been referred to the Board for hearing. I find it has no relevance to the issues of liability or damages in this case.

Five other unit owners testified with respect to their use of the Centre and how that use would be affected by granting unrestricted access to Children. A number of them regularly engage in swimming activities, particularly swimming lengths of the pool. All

who did so testified that the presence of children playing in the pool at the same time would render this activity unpleasant at best, and impossible at worst. As I understand it, the pool has no lanes and could not be divided to permit separate activities to occur in two different areas of it. Additionally, at least one of the witnesses who is elderly and disabled, expressed concern that he and other users like him could be injured if other swimmers collided with them. He thought that Children posed a significantly greater danger in this respect than did other adults. I also heard that the pool is regularly used for fitness classes, during which time no recreational swimming is permitted.

With respect to the whirlpool and the fitness room, several witnesses expressed concern about the safety of children using these facilities. I heard for example, that the fitness room contains free weights and universal weight machines which could easily hurt a child. It also contains exercise equipment (e.g. stationary bikes) that is too large for many Children to use safely. Most of the witnesses expressed the view that some age restrictions were appropriate in these areas, if only because a certain level of maturity and judgment was required of the user in order to recognize and avoid situations that might imperil personal safety, or might cause damage to the facilities. Similar concerns were expressed with respect to the whirlpool, which it is unsafe to use for extended periods of time.

The Children's rules were altered significantly in 1996 and 1997. As of September 29, 1997, Children over 4 years of age could use the whirlpool in the company of an adult, although health warnings respecting the advisability of whirlpool use by youngsters were posted. As well, the swimming pool hours for Children over 4 years of age were extended to include the hours of 4:00 p.m. to 6:30 p.m. daily. Use of the hobby room was also opened up to Children, provided they were accompanied by an adult. These rule changes were effected by the Boards of Directors of the Respondents, subject to ratification by the unit owners at their annual general meeting scheduled for late spring 1998.

REASONS

(1) Does the complaint relate to "occupancy of accommodation" or "provision of services"?

Parties' Positions

The Commission submits that the Complainant was discriminated against on the basis of family status in respect of his occupancy of accommodation, contrary to s. 2(1) and 9 of the *Code*.

The Respondents submit that, to the extent that such discrimination occurred, it related not to the occupancy of accommodation under s. 2(1) of the *Code*, but to the provision of services under s. 1. It is their further position that s. 20(3) of the *Code* affords them a defence and precludes a finding of an infringement under s. 9. The applicability of the s. 20(3) defence is dealt with later in these reasons.

Analysis

Sections 1 and 2 of the *Code* read:

> 1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.
>
> 2(1). Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap or the receipt of public assistance.

The term "occupancy of accommodation" is not defined in the *Code*. Nor was I directed to any decision in which its meaning was discussed. The Divisional Court's decision in *York Condominium Corp. No. 216 v. Dudnik* (1991), 79 D.L.R. (4th) 161, however, is premised on the notion that "occupancy of accommodation" includes the occupancy of

a condominium unit. The issue in this case is whether access to the Centre is an integral part of the Complainant's occupancy of Unit #908.

In my view, the use of the Centre is an integral part of the Complainant's occupancy of Unit #908. He has purchased the right to exclusive use and ownership of Unit #908, and he has also purchased a shared ownership interest in Trillium's common elements, including the Centre, the operations and maintenance of which are supported by the condominium fees paid monthly by the Complainant and the other unit owners. The portion of the condominium fees that provide for the maintenance of the Centre are not billed, paid, or accounted for separately from fees payable in respect of the other common elements. Furthermore, none of the unit owners in the Respondents' buildings can choose not to possess an ownership interest in the Centre, or not to support it with their monthly fees.

The essence of a "service" or "facility" under s. 1 of the *Code* is that it is something to which any member of the public may request access, even though the actual provision of such service or facility might be subject to discretionary criteria, which could result in some of those requests being denied. A "service" or "facility" is at least available to the public for the asking: access to the Centre is not available to the public at all.

I therefore conclude that the alleged discrimination relates to the Complainant's occupancy of accommodation.

(2) If the complaint relates to the "provision of services", have the Respondents made out a defence under s. 20(3) of the *Code*?

There is no statutory defence available or relied on in respect of the assertion that the alleged discrimination related to the Complainant's occupancy of accommodation. However, in the event that I am wrong in concluding that the alleged discrimination

related to the occupancy of accommodation rather than to the provision of services and facilities, I now deal briefly with the Respondents' argument respecting s.20 (3) of the *Code*.

Parties' positions

The Respondents assert that the Centre is a "recreational club" within the meaning of s.20(3) of the *Code* and is permitted to discriminate on the basis of family status with respect to the services available there.

The Commission submits that the Centre is not a recreational club.

Analysis

Section 20(3) of the *Code* provides:

> The right under section 1 to equal treatment with respect to services and facilities is not infringed where a recreational club restricts or qualifies access to its services or gives preferences with respect to membership dues and other fees because of age, sex, marital status or family status.

The term "recreational club" is not defined in the *Code*, nor was I provided with any case law dealing with the interpretation of this term. In my view, however, the provision itself offers some guidance, as does the general law with respect to "clubs".

Section 20(3) suggests that one of the *indicia* that something is a recreational club is the fact that membership dues or fees are payable in respect of its services. While the unit owners certainly pay for the upkeep of the club and in fact own its physical plant, they are not assessed dues or fees that are distinctly referable to the cost of the amenities provided there.

More significantly, I understand the general legal character of clubs to be voluntary associations of persons who have come together for a common purpose. It is clear that there is nothing voluntary about "membership" in the Centre. All unit owners have paid for the Centre as part of the purchase price paid in respect of their individual units and the common elements: they cannot choose to be or not to be "members" of it.

The unit holders who testified before me all considered the Centre a "club" because it provided similar amenities to other health clubs to which they had formerly belonged, but from which they had resigned upon taking up residence in the Respondents' buildings. This evidence establishes that the Centre is a place where "recreation" is pursued: it does not establish the Centre's legal character. Although it is a place where "recreation" is pursued, I conclude that "membership" in the Centre lacks the requisite degree of voluntariness for it to be considered a "club" for the purposes of s. 20(3) of the *Code*.

(3) Did the Complainant suffer direct discrimination on the basis of "family status"?

The Parties' Positions

The Commission submits that the Centre's restrictions on use by Children constitute direct discrimination against the Complainant in his capacity as a parent. In this regard, they rely on the decision of the Divisional Court in *Dudnik, supra*.

The Respondents argue that the restrictive criterion in the Children's rules is age, not family status. They take the position that age is not an element of "family status" and rely on the Divisional Court decision in *Royal Insurance Co. of Canada and Ontario Human Rights Commission et al* (1985), 51 O.R. (2d) 797. Consequently, the Respondents argue, the rules do not directly discriminate on the basis of family status.

Analysis

Section 10 (1) of the *Code* defines "family status" to mean "the status of being in a parent and child relationship".

Royal Insurance involved an appeal from the decision of a board of inquiry finding that the complainant had been discriminated against on the basis of family status when he was required to pay an additional premium to add his 16-year old son to his automobile insurance policy. The Divisional Court allowed the appeal, holding that the impugned contract of insurance was entered into prior to the proclamation of the *1981 Code,* such that the board of inquiry was without jurisdiction to hear the matter. The Court went on, however, to say the following about the merits of the decision under appeal:

> Although my finding on the first issue is sufficient to dispose of the matter, I will briefly consider the second. Mr. Hope alleges an infringement of his right to contract on equal terms without discrimination because of his "family status". "Family status" is defined as "the status of being in a parent and child relationship". The Board found that "family status" as a ground of discrimination extends to the age, sex and marital status of a particular child.
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> I am of the view that the complaint does not raise the family status ground of discrimination. It is not the parent and child relationship that causes the increase in premiums. Rather, it is the fact that the occasional driver is under 25 years of age. All parents are treated identically with respect to the rates of occasional drivers. It is the age, sex and marital status of the drivers that are treated differently. The complaint, as such, fails to allege a ground of discrimination within the meaning of s. 3 of the Code. (at p. 800)

The appellant condominium corporations in *Dudnik* relied unsuccessfully on the decision in *Royal Insurance*. *Dudnik* involved an appeal from a board of inquiry's determination that condominium corporations' prohibitions on children under 18 living in their buildings constituted unlawful discrimination on the basis of family status as against the parents of such children who owned or occupied, or wished to own or occupy units in those buildings. In addition to noting that the excerpt from *Royal Insurance* dealing with this issue is *obiter*, the *Dudnik* court stated:

> The relationship of parent and child can be involved in a situation where a higher premium is charged for an insurance policy because of the age of a proposed driver of the insured vehicle. However, any discrimination which may arise from that situation is not because of that relationship. The family as a unit is not disturbed and in fact that motor vehicle remains available to be used by or on behalf of all

> its members. Those who are in the family and are under the specified age and who intend to operate the motor vehicle can affect the insurance coverage if the additional premium is not paid. That is the only effect of the practice.
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> In circumstances such as those which exist in the present case, while the restriction or policies in question can apply to individuals not in a parent-child relationship, because they are only concerned with accommodation it is bound to be otherwise in most instances. And the discrimination which follows their application, of necessity, in this situation, is directed at and does affect the "family status". Such restrictions and policies are aimed at preventing children under the specified age from residing with their parent or parents in the latter's choice of accommodation. (at pp. 167-68)

In considering what impact these decisions have on this case, several aspects of the legal context in which they arose are worth noting.

First, although the *Code* proscribed discrimination on the basis of "age", because it defined "age" as 18-65 years, it offered no protection against age-based discrimination of those under 18 years of age. With the exception of the specific occupancy of accommodation protections that s. 4 offers to 16 and 17 year old persons who have withdrawn from parental control , the *Code* still does not generally prohibit discrimination against persons under the age of 18. Consequently, in *Dudnik*, *Royal Insurance* and here, the allegedly discriminatory behaviour is challenged on the grounds of "family status", even though the behaviour in each case involves the application of age-based criteria.

Second, the constructive discrimination provisions of the *Code* (section 11) had not yet been proclaimed when *Royal Insurance* was decided.

Third, the *Dudnik* complaint was filed in a specific context of statutory reform. Prior to *Dudnik* , the *Code* specifically permitted occupancy of accommodation to be restricted on the basis of family status where dwelling units in a building shared a common entrance. This section was repealed, suggesting strongly that, absent specific permission, such

restrictions on occupancy would contravene the *Code*. In the same set of amendments, prohibitions on constructive discrimination were introduced into the *Code*, even though the Supreme Court of Canada in *Ontario Human Rights Commission v. Simpson Sears* [1985] 2 S.C.R. 536 had already found that the predecessor legislation encompassed such prohibitions.

In the legal context of the time, there was no established body of jurisprudence considering the application of s.11 of the *Code*, or how it might compare to the protections found to exist in *Simpsons-Sears*. The *Dudnik* board of inquiry and reviewing court were prepared to find that "adult only" condominiums directly discriminated on the basis of family status because they prevented young children from residing with their parents. The board was also prepared to make the alternative finding of constructive discrimination, but did not provide a detailed analysis on this point. The Divisional Court did not deal with this aspect of the decision. The central question, in the *Dudnik* analysis of whether direct discrimination had occurred, was whether "the family as a unit" was disturbed by the allegedly discriminatory behaviour.

The applicability of the *Dudnik* and *Royal Insurance* analysis to the instant case is doubtful in a changed legal context. Now that the *Code* expressly proscribes constructive discrimination and an established body of related jurisprudence has developed, it is more appropriate to apply that analysis and to consider whether an age-based criterion which does not constitute discrimination on a prohibited ground (because the age is less than 18 years) has a differential impact on parents. By contrast, the *Dudnik* and *Royal Insurance* approach involves contorting the notion of direct discrimination on the basis of family status to encompass age-based exclusions in circumstances where an adjudicator adjudges the latter to be sufficiently disruptive of the family unit. *Royal Insurance* stands for the proposition that not all disadvantages or costs associated with parenthood are sufficiently disruptive, but there are no obvious standards by which to measure the sufficiency of that disruption. If compelled to apply the *Dudnik* and *Royal Insurance* approach, however, I do not find that

the rules "disturb the family unit", for the reason that the Complainant and his daughter can live together in Unit #908 (unlike *Dudnik*), they are simply prevented from using the Centre together without restrictions as to times and facilities.

Consequently, I find that the age-based restrictions in the rules do not directly discriminate against the Complainant on the basis of family status.

(4) Did the Respondents' rules respecting children's use of their recreational facilities have a differential impact on parents? Did the Respondents fail to offer appropriate accommodation to the needs of parents, thereby constructively discriminating on the basis of "family status" ?

The Parties' Positions

The Commission submits that the Children's restrictions have a differential impact on parents, and hence constructively discriminate against them. To the extent that this is found to be the case, however, the Respondents' position is that they have attempted to accommodate the Complainant to the point of undue hardship. In this regard, several unit owners testified about the medical necessity of their using the Centre, the use they made of its facilities, and, particularly with respect to the swimming pools, how the beneficial effects of that use would be diminished or destroyed by granting Children unrestricted access at all times.

Analysis

The Complainant's own use of the Centre was not affected by the restrictions that apply to Children. The Complainant did not wish to use the Centre alone, however. He wanted his daughter to accompany him there. Prior to her 16th birthday, the range of activities they could engage in was severely circumscribed by the restrictions applicable to Children.

While the rules respecting Children's' use of the Centre can apply to individuals not in a parent-child relationship, in most instances the adults who will wish to use the Centre in the company of children will be parents, and the adults who will be restricted from using them on their own because of their child-care responsibilities will be parents. The rules have a disparate negative impact on parents who own or occupy the affected condominiums.

Having found that the Childrens' rules result in a restriction on parents who are unit owners or residents, I must now consider whether that restriction is reasonable and *bona fide* within s. 11(1), and whether the Complainant has been accommodated as required by s. 11(2).

> 11(1) A right of person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
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> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
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> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
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> (2) The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

The Respondents argued that the age-based restrictions on use of the Centre were a reasonable and *bona fide* attempt to balance the needs of all unit owners, and were furthermore predicated on considerations of safety. They further submitted that the needs

of parents could not be accommodated without undue hardship to them. They said that such hardship would arise in three respects.

First, the Respondents claimed that the elimination of the Childrens' rules would result in increased maintenance costs. No estimates were provided to me, however, and I heard only anecdotal and speculative evidence of the damage Children might inflict on the Centre. Indeed, the only incident of actual damage to the property I heard about related to the billiard tables, but it appeared that persons over 16 years of age were the culprits.

Second, the Respondents claimed health and safety concerns about permitting Children to use all of the Centre's facilities. For example, there was concern expressed about the safety hazards of the moving pieces on the weight machines; the potential for injury due to use of equipment that was not capable of being adjusted to fit Children; and the potential health risks associated with Childrens' use of the whirlpool. No evidence was led about the physiological impact that weight training might have on Children who have not yet finished growing. The Respondents were additionally concerned that the elimination of the Childrens' rules might compel them to incur the additional expense of hiring someone to monitor the Centre and ensure that equipment was being used safely.

Third, the Respondents claimed that elimination of the Childrens' rules would detrimentally affect the other residents' enjoyment of the Centre, and particularly the swimming pool. In the case of some residents, there was evidence that Childrens' unrestricted use of the pool would pose a health and safety hazard to them.

A condominium corporation is, like all corporations, comprised of shareholders to whom it is accountable for its actions. The shareholders of the Respondents are the unit owners, many of whom reside in Skypark, Vista and Trillium and use the Centre. Any measures taken to accommodate the needs of one shareholder (the Complainant) to use and enjoy the Centre may impact upon the other shareholders' (the other unit owners) use and

enjoyment of the Centre. In this sense, the Respondents are in a position analogous to a bargaining agent faced with the prospect of modifying the workplace rules contained in a collective agreement in order to accommodate a particular worker or class of workers. The extent to which the duty to accommodate will compel such modification must be assessed having regard to the impact of the modification on the other employees to whom the collective agreement applies. The Supreme Court of Canada has addressed this issue as follows:

> . . . the representative nature of a union must be considered. The primary concern with respect to the impact of accommodating measures is not, as in the case of the employer, the expense to or disruption of the business of the union but rather the effect on other employees. . . . Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect. Although the test of undue hardship applies to a union, it will often be met by a showing of prejudice to other employees if proposed accommodating measures are adopted.
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> *Central Okanagan School District No. 23 v. Renaud* (1992), 95 D.L.R. (4th) 577, at p. 590-91, per Sopinka, J.

I am satisfied that allowing Children unrestricted access to the Centre at all times -- that is having no Childrens' rules at all -- would occasion undue hardship to the Respondents, having regard to the impact on other unit owners who use the Centre. The fact that the 1988 rules respecting Children's use of the Centre were less restrictive than the 1992 rules, that the restrictions were loosened again in 1996 and 1997, and that other users testified that despite some personal inconvenience, they were largely content with the revised rules, compel me to conclude that the Complainant and his daughter could have been provided with greater access to the Centre without occasioning undue hardship to the Respondents. Consequently, I find that the Childrens' rules in existence at the time this complaint was made were not reasonable and *bona fide* because they did not go as far as they might have in accommodating the Complainant's needs short of undue hardship.

REMEDY

Parties' Positions

The Commission submitted that an appropriate measure of general damages in respect of the Complainant's loss of the right to be free from discrimination on a prohibited ground in his occupancy of accommodation is $3000.00. No special damages were claimed. The Commission further submitted that I should declare all the rules restricting Children's use of the Centre to be contrary to the *Code*. It made no alternative submissions with respect to how the rules might be modified to satisfactorily balance the needs of all users, including parents of Children.

The Respondents submitted that the Complainant had not established any entitlement to damages. They further submitted that the rules as amended in September, 1997, met all of the Complainant's earlier requests in terms of increased Children's access to the Centre.

The Complainant wanted and obtained access to the whirlpool and to the swimming pool during an after-school period. His interest in using the fitness room does not ever appear to have been raised with the Respondents prior to this hearing. The Respondents noted that to make the swimming pool available to Children at all times would severely diminish adult user's enjoyment and use of this amenity, in a situation where 97% of the condominium owners and occupants are adults.

Analysis and Orders

While his daughter was under 16 years of age, the Complainant's right to freedom from discrimination on the basis of family status in respect of his occupancy of accommodation was infringed by the Centre's restrictions applicable to Children. The value of that right to him can be assessed having regard not only to his testimony that he was upset and angry and found it difficult and hurtful to explain to his daughter that "adults don't like kids",

but also to the attempts he made to assert the right, which were few indeed, notwithstanding the mechanisms available under the *Condominium Act*. Respondents cannot be held accountable for failing to accommodate unless the circumstances demanding accommodation have been brought to their attention. I assess general damages at $500.00, and order the Respondents to pay this amount to the Complainant within thirty days of this decision, failing which it will attract post-judgment interest in accordance with the *Courts of Justice Act*. The Complainant is excused from having to pay any portion of his own damages.

On the basis of the evidence presented, I am concerned that the abolition of all restrictions with respect to Children would significantly impair the enjoyment of the majority of the Centre's users. I accept the evidence that it is not possible to swim laps in the Centre's pools while children are playing in the water, and that the indoor pool will not accommodate lane markers. The Commission's only submission with respect to remedy, however, was that all restrictions with respect to Children's use of the Centre be removed. It provided me with no alternative position with respect to how the needs of parents such as the Complainant might be accommodated. Although the Commission suggested to some witnesses that the swimming pool rules be altered to exclude prohibitions on the basis of age, and to instead proscribe certain behaviours, by for example, banning all but lap swimming, those witnesses all testified that they had never seen Children swimming laps. I have no reason to doubt their testimony, however, it seems at least possible that some Children practising strokes learned in swimming lessons or who are members of swim teams might swim laps. Nevertheless, if it is the case that Children do not as a rule swim laps in the Centre's pools, I do not see how my making an order banning all but lap swimming would meaningfully redress the problem of inadequate access to the pool by parents and their Children. Indeed, it might well exacerbate it. In any event, the Commission put no such remedial position to me for consideration.

I am also concerned that not all Children are at the same stage developmentally such that they should have unrestricted access to all of the Centre's amenities. Some differentiation between Children based on their age or size, or whether or not they are toilet trained, may be advisable. I was, however, not provided with an evidentiary basis for proscribing Children's use of the amenities on this basis.

Rules respecting the Centre must be sensitive to the concerns of all its potential users, that is all unit holders or occupants. There was evidence establishing that the recreation committee has attempted to keep in mind the changing demographic of the buildings' residents from time to time in considering what amenities to offer, and what rules to recommend respecting them. The amendments to the rules in 1996 and 1997 reflect the ongoing efforts of the recreation committee to balance the interests of all potential users. Given that the 1997 rules satisfied all of the Complainant's earlier requests for changes and that no other unit owners with Children testified that they unduly restricted their access to the Centre, I am unable to find that the September 1997 Rules failed to adequately accommodate the needs of parents. As indicated earlier, however, it is clear that the 1992 Rules did fail to accommodate parents, contrary to the *Code*.

My view is that the needs of parents and children in this community of condominium dwellers can best be served by a requirement that at least one place on the recreation committee be made available to a unit holder or occupant who is the parent of a child under 16 years of age. If no such person volunteers to be on the committee, then I order the committee to convene a meeting or conduct a biennial survey of all unit holders or occupants who are the parents of Children to ascertain their views with respect to the rules respecting the use of the Centre by Children, and to take those views into account in determining whether to recommend changes to the rules respecting use of the Centre.

Dated at Toronto this 30th day of June, 1998:

Mary Anne McKellar
Member, Board of Inquiry